

**Commonwealth of Kentucky  
Workers' Compensation Board**

OPINION ENTERED: **June 1, 2018**

CLAIM NOS. 201201514 & 201201510

AUSTIN POWDER COMPANY

PETITIONER

VS.

**APPEAL FROM HON. MONICA RICE-SMITH,  
ADMINISTRATIVE LAW JUDGE**

BILLY KEITH STACY  
AND HON. MONICA RICE-SMITH,  
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

**OPINION  
AFFIRMING**

\* \* \* \* \*

BEFORE: ALVEY, Chairman, STIVERS and RECHTER, Members.

**RECHTER, Member.** Austin Powder Company ("Austin Powder") appeals from the December 17, 2017 Opinion On Remand and the February 8, 2018 Order rendered by Hon. Monica Rice-Smith, Administrative Law Judge ("ALJ"), finding Billy Keith Stacy ("Stacy") permanently totally disabled. On appeal, Austin

Powder argues the ALJ's decision is not based upon substantial evidence and the impairment ratings supporting the award of permanent total disability ("PTD") benefits are invalid. Additionally, Austin Powder questions the application of Parker v. Webster County Coal, LLC (Dotiki Mine), 529 S.W.3d 759 (Ky. 2017). For the reasons set forth herein, we affirm.

### **HISTORY**

This claim has a lengthy procedural history and has previously been appealed to the Kentucky Supreme Court. For this reason, we begin with a recitation of the prior opinions rendered in this claim. We will discuss the lay and medical proof as it relates to the issues on appeal.

Stacy worked as a drill operator for Austin Powder from 2005 until his lay-off on April 16, 2012. He alleged cumulative trauma injuries to his low back, wrists, and hands, and occupational hearing loss that became disabling on April 16, 2012. These claims were resolved by Opinion, Order, and Award rendered by Hon. Scott Borders, Administrative Law Judge ("ALJ Borders"), on December 23, 2013.

#### ***ALJ Borders' Opinion***

ALJ Borders determined Stacy suffered from occupational noise-induced hearing loss and repetitive trauma injuries to his wrists and low back. He relied upon Dr.

Arthur Hughes' medical opinion that Stacy suffers a 16% permanent impairment rating. Dr. Hughes assessed a 5% impairment rating for Stacy's low back pain, 6% for the reduced range of motion in his wrists, and 6% for reduced grip strength. The ALJ further concluded Stacy is permanently totally disabled.

### ***Workers' Compensation Board Opinion***

Austin Powder appealed. This Board affirmed the award of benefits for occupational hearing loss, but vacated the award of benefits for the wrist and low back injuries. We affirmed ALJ Borders' reliance upon a 6% impairment rating, which Dr. Hughes assessed for reduced range of motion in the wrists. However, we concluded the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5<sup>th</sup> Edition ("AMA Guides") does not permit an impairment rating for loss of grip strength. We also vacated the determination Stacy suffered a 5% impairment as a result of the low back injury. Again, we concluded Dr. Hughes' impairment rating, upon which ALJ Borders relied, did not comport with the AMA Guides.

### ***Court of Appeals and Supreme Court Decisions***

The Court of Appeals affirmed the Board with respect to the lumbar spine and bilateral wrist injuries.

Austin Powder appealed to the Supreme Court, challenging only the Court of Appeals' findings with respect to the bilateral wrist injuries. Before the Supreme Court, Austin Powder advanced a number of arguments regarding the reliability of Dr. Hughes' impairment ratings. The Supreme Court agreed that the portion of Dr. Hughes' impairment rating based on loss of grip strength is invalid. However, it rejected Austin Powder's arguments that Dr. Hughes did not have a comprehensive medical history, was unaware of Stacy's work duties, did not identify the source of Stacy's pain, and relied on hearsay evidence regarding arthritis. The Supreme Court remanded the claim for the ALJ to determine the extent and duration of Stacy's wrist-related disability, excluding the 6% impairment rating based on loss of grip strength.

In summation, the Supreme Court combined its mandate with that of the Court of Appeals, and directed the ALJ to: (1) determine whether Stacy suffered a lumbar spine injury entitling him to medical expense benefits; (2) determine whether any entitlement to lumbar spine medical benefits is temporary or permanent; (3) determine the extent and duration of Stacy's wrist-related disability.

### ***ALJ's Opinion on Remand***

On remand, the ALJ concluded Stacy sustained a work-related, cumulative trauma injury to his low back and is entitled to medical benefits for that condition. She relied upon Stacy's testimony that he continues to experience back pain that impairs his ability to stand and walk. Finding this impairment to be permanent, the ALJ awarded permanent medical benefits.

Regarding Stacy's wrist injuries, the ALJ concluded he suffers a 6% whole person impairment. She relied upon Dr. Hughes' impairment rating to support this conclusion. The ALJ then examined the extent of Stacy's disability, and concluded he is permanently totally disabled:

The ALJ finds Stacy's testimony to be credible in all areas. Stacy testified if he uses his hands, they swell and cause him severe pain. Any kind of work causes swelling in his hands and he is unable to use his hands for a couple days. Stacy testified due to his condition, he would miss a lot of work.

As previously discussed, the ALJ is persuaded by the opinion of Dr. Hughes. Dr. Hughes admitted that strictly applying the AMA Guides would result in Stacy having a 6% whole person impairment based on the restricted range of motion in his wrists. He imposed significant restrictions on Stacy's activities. He advised Stacy should avoid prolonged standing or walking and lifting no more than 10 pounds regularly and 10 pounds

occasionally. He opined Stacy could not return to the work he was performing at the time of his injury.

Further, Dr. Raichel imposed restrictions on Stacy's activities. He restricted Stacy to working 2 hours per day, standing for an hour and sitting for an hour. He restricted Stacy to only occasional manipulation with the right and left hands, squatting, crawling, climbing, and reaching above shoulder level. Stacy is restricted from operating machinery. Dr. Raichel indicated that Stacy suffered from severe pain and would miss fifteen days of work per month due to his conditions.

Although Dr. Schiller and Dr. Gabriel opined there is no permanent impairment, as previously discussed the ALJ finds their opinions less than persuasive.

In considering the factors of *Osborne*, the ALJ finds Stacy permanently and totally disabled. Stacy is sixty-five (65) years old with a high school education. He has worked the last 41 years as a heavy equipment operator on surface coalmines. Dr. Hughes, Dr. Raichel and Dr. Belhasen agree Stacy cannot return to his work as a heavy equipment operator. Dr. Hughes and Dr. Raichel imposed significant restrictions on Stacy's ability to stand and walk, in addition to his ability to use his hands. Stacy testified he has difficulty walking, standing or using his hands without them swelling and causing him serve pain and difficulty. He testified he would have to miss a lot of work due to his hand condition. Dr. Raichel agreed that he would miss significant work. Based on the foregoing, there is no likelihood that Stacy would be successful

in finding gainful employment or in being productive in a competitive work force.

Austin Powder filed a petition for reconsideration arguing the ALJ erred in considering a low back condition for which there was no impairment rating. Additionally, it questioned whether Parker should be applied as final, as the case may be appealed to the U.S. Supreme Court. The ALJ overruled the petition for reconsideration, noting Stacy suffered injuries to the low back in addition to the wrists, for which there is an impairment rating. The ALJ considered the petition a re-argument of the merits of the claim.

#### **ANALYSIS**

Austin Powder has again appealed, advancing three arguments. It first argues Dr. Hughes' opinion is not substantial evidence upon which the ALJ could rely. It further avers the finding of total disability is not permitted because there is no impairment rating for the lumbar spine injury. Finally, Austin Powder claims the decision in Parker should not be applied to this claim because that case may be appealed to the United States Supreme Court.

#### ***Medical Opinion of Dr. Arthur Hughes***

We turn first to Austin Powder's challenge to the reliability of Dr. Hughes' opinion. It claims Dr. Hughes' diagnosis of arthritis is, in fact, based on hearsay because

Stacy merely repeated another physician's diagnosis to Dr. Hughes. It further argues Dr. Hughes admitted his range of motion evaluation was not in conformity with the AMA Guides, and he was unaware of Stacy's exact work duties.

We find it troublesome that Austin Powder would raise the exact challenges to Dr. Hughes' opinion and impairment rating which it raised before the Kentucky Supreme Court and which were expressly rejected. The Court noted that, although Dr. Hughes did not perform passive range of motion measurements, active motion testing takes precedence in the AMA Guides. The Court further noted the percentage assigned by Dr. Hughes was proper based upon the measurements he obtained. Thus, as the Supreme Court explained, Austin Powder's reliance upon Jones v. Brasch-Barry General Contractors, 189 S.W. 3d 149 (Ky. App. 2006) is misplaced because that case involved a rating in excess of the rating provided for in the AMA Guides.

As Austin Powder is well aware, the Supreme Court determined Dr. Hughes' impairment rating based on loss of range of motion constitutes substantial evidence. The Court considered Austin Powder's arguments that Dr. Hughes received an incomplete medical history, failed to understand the nature of Stacy's work, failed to identify the source of

Stacy's pain, relied upon hearsay evidence to diagnose arthritis, and based his diagnosis on symptoms rather than objective medical evidence. The Court rejected these challenges and concluded Dr. Hughes' opinion is reliable evidence upon which the ALJ could rely. This Board is not at liberty to reconsider the Court's decision. Therefore, it was within the ALJ's discretion to rely upon Dr. Hughes' opinion and 6% impairment rating based on loss of range of motion in the wrists.

***Award of Permanent Total Disability Benefits***

Austin Powder next claims an award of PTD benefits cannot be based, even in part, on a lumbar spine injury for which no impairment rating has been assigned. It asserts the ALJ assessed a total disability based "largely" upon restrictions for the low back. According to Austin Powder, the inability to labor must result solely from the wrist injury, because that is the only injury for which an impairment rating was assessed.

We begin by noting Austin Powder has not questioned whether substantial evidence supports the ALJ's determination Stacy is permanently totally disabled. It solely makes the legal argument that restrictions imposed due to the lumbar

injury could not be considered. We reject this argument for two reasons.

First, we disagree the ALJ's finding of total disability is based "largely" on restrictions imposed for the lumbar spine injury. To the contrary, the ALJ relied upon the fact Stacy could not work a five-day work week, or even part-time, due to the condition of his hands and wrists. This conclusion is supported by both Stacy's testimony and the medical proof, and we again emphasize Austin Powder has not challenged the sufficiency of the evidence underlying the ALJ's decision.

Turning to the substance of Austin Powder's argument, we find no authority for its position that the ALJ cannot consider restrictions related to the lumbar injury for which no valid impairment rating was introduced. It is important to remember the difference between an impairment, and an impairment rating or disability. The Supreme Court in FEI Installation, Inc. v. Williams, 214 S.W.3d 313 (Ky. 2007), instructed that KRS 342.020(1) does not require proof of an impairment rating to obtain future medical benefits, and the absence of a functional impairment rating does not necessarily preclude such an award. Further, we note the AMA

Guides define impairment as being a "loss, loss of use, or derangement of any body part, organ system or organ function."

Here, the impairment ratings for loss of grip strength and for the lumbar condition assigned by Dr. Hughes were not in accordance with the AMA Guides. However, his 6% rating for loss of motion constitutes substantial evidence. Having determined Stacy has a disability rating for the wrist injury and that he has a permanent injury to the lumbar spine, the ALJ was permitted to consider all impairment and restrictions resulting from the work-related injuries in determining Stacy's occupational disability. We must also emphasize the ALJ most heavily relied upon Stacy's restrictions relating to the wrist injuries, which prevent him from working a five-day work week due to swelling and pain. We find no error and, therefore, affirm the conclusion Stacy is permanently totally disabled.

***Application of the 1994 version of KRS 342.730(4)***

The Kentucky Supreme Court, in Parker, held the age limitation in KRS 342.730(4) violates the right to equal protection and is now final. The ALJ applied the pre-amendment, 1994 version of KRS 342.730(4). Austin Powder has not appealed the decision to apply the 1994 version of the statute. Rather, it argues Parker is not valid, applicable

law because it may be appealed to the United States Supreme Court or amended by the General Assembly.

This Board must apply Parker to all timely appealed decisions. This Board is without discretion to suspend application of Parker because it may be further appealed. We acknowledge Austin Powder's stated purpose of protecting this issue for purposes of future appeal.

#### **CONCLUSION**

Accordingly, the December 17, 2017 Opinion on Remand and the February 8, 2018 Order rendered by Hon. Monica Rice-Smith, Administrative Law Judge, are hereby **AFFIRMED**.

ALL CONCUR.

#### **COUNSEL FOR PETITIONER:**

HON WALTER E HARDING  
400 W MARKET ST #2300  
LOUISVILLE, KY 40202

#### **COUNSEL FOR RESPONDENT:**

HON MCKINNLEY MORGAN  
921 S MAIN ST  
LONDON, KY 40741

#### **ADMINISTRATIVE LAW JUDGE:**

HON MONICA RICE-SMITH  
ADMINISTRATIVE LAW JUDGE  
PREVENTION PARK  
657 CHAMBERLIN AVENUE  
FRANKFORT, KY 40601